

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 22 2008

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

DEANGELO LEROY TURNER,

Petitioner - Appellant,

v.

GUY HALL,

Defendant - Appellee.

No. 07-35500

D.C. No. CV-05-00587-ALA

MEMORANDUM *

Appeal from the United States District Court
for the District of Oregon
Ann L. Aiken, District Judge, Presiding

Argued and Submitted May 6, 2008
Portland, Oregon

Before: TALLMAN and CLIFTON, Circuit Judges, and KORMAN,** District Judge.

Deangelo Turner appeals the district court's denial of his petition for habeas corpus under 28 U.S.C. § 2254. We affirm in part, and dismiss in part.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Edward R. Korman, Senior District Judge, Eastern District of New York, sitting by designation.

The district court did not abuse its discretion by refusing to hold an evidentiary hearing. Turner argues that he is entitled to an evidentiary hearing to develop additional information to support his claim that the trial court erroneously denied his motion to sever, and that he is actually innocent despite his conviction for intentional murder. Turner did not, however, establish what additional evidence he could develop, why that evidence “could not have been previously discovered through the exercise of due diligence,” or how the additional evidence he wishes to develop would have likely affected the outcome of his trial. *See* 28 U.S.C. § 2254 (e)(2)(A)(ii); *Williams v. Taylor*, 529 U.S. 420, 432 (2000); *Rich v. Calderon*, 187 F.3d 1064, 1067 (9th Cir. 1999) (noting that petitioners are not entitled to go on fishing expeditions in search of evidence that may or may not support their claims).

Turner’s claim that the Oregon state court violated his Sixth and Fourteenth Amendment rights by failing to sever his trial from that of his co-defendant, Ronald Simmons, was procedurally defaulted. Turner asked the Oregon State Supreme Court to conclude that joinder was “clearly inappropriate” under OR. REV. STAT. § 136.060. In so doing, Turner failed to exhaust his state remedies by giving the state courts a “fair opportunity” to act on his claims before seeking collateral review in the federal courts. *See* 28 U.S.C. § 2254(b)(1); *O’Sullivan v.*

Boerckel, 526 U.S. 838, 844-45 (1999). He did not cite any provisions of the federal constitution, federal statutes, or any federal case law to alert the Oregon Supreme Court to the federal nature of his severance claim in his petition for review. *See Baldwin v. Reese*, 541 U.S. 27, 31-32 (2004) (rejecting petitioner’s argument that a federal claim is fairly presented when an appellate judge can discover that claim only by reading lower court dispositions in the case).

Turner cannot overcome this procedural default through the actual innocence gateway articulated in *Schlup v. Delo*, 513 U.S. 298 (1995). The evidence that he presented did not establish that it is more likely than not that no reasonable juror would convict him of intentional murder. *Schlup*, 513 U.S. at 329. Much of the “new” evidence did not exculpate him, but rather was consistent with the State’s theory that both Turner and Simmons were involved in the murder. James Jackson’s testimony that Simmons confessed while in custody that “he alone committed the murder” was unlikely to change the outcome of the verdict given the strong direct and circumstantial evidence of petitioner’s guilt on the trial record.

AFFIRMED IN PART, DISMISSED IN PART.